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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte ERIC C. STEINDORF

Appellant

Appeal 2008-5314
Application 10/743,260
Technology Center 3700

Decided: November 13, 2008

Before RICHARD E. SCHAFER, SALLY GARDNER LANE, and SALLY
C. MEDLEY, *Administrative Patent Judges*.

LANE, *Administrative Patent Judge*.

DECISION ON APPEAL

I. STATEMENT OF THE CASE

The appeal is from a Final Rejection of claims 1-5, 10, 12, 13, 15, 16, 20 and 25. 35 U.S.C. § 134. Claims 6-9, 11, 14, 17-19, 21-24, 26 and 27 have been withdrawn (App. Br. 2) in response to a requirement for the election of species. (*See* Office Action mailed July 26, 2004 at 2-3). We have jurisdiction under 35 U.S.C. § 6(b). We affirm.

The application was filed December 22, 2003. It was published on January 23, 2005, as Application Publication 2005/0133036. The real party in interest is said to be Kimberly-Clark Worldwide, Inc. (App. Br. 2).

The Examiner relied on the following references:

<u>Name</u>	<u>Number</u>	<u>Date</u>
Baumann	6,354,296	Mar. 12, 2002
Niemeyer	4,951,664	Aug. 28, 1990

The Examiner rejected claims 1-3, 5, 10, 12, 13, 20, and 25 under 35 U.S.C. § 102(b) over Baumann. Appellant did not argue separately for the patentability of any of these claims. We review claim 1 as a representative claim. *See* Bd. R. 37(c)(1)(vii).

The Examiner also rejected claims 4, 15, and 16 under 35 U.S.C. § 103(a) over Baumann and Niemeyer.

II. LEGAL PRINCIPLES

Claimed subject matter is anticipated by the teachings of a reference only if the claimed subject matter is identically disclosed or described by the teachings of the reference. *Richardson v. Suzuki Motor Co.*, 868 F.2d 1226, 1236 (Fed. Cir. 1989) (“The identical invention must be shown in as complete detail as is contained in the patent claim.”).

“When a work is available in one field of endeavor, design incentives and other market forces can prompt variations of it, either in the same field or a different one. If a person of ordinary skill can implement a predictable variation, § 103 likely bars its patentability.” *KSR Int’l Co. v. Teleflex, Inc.*, 127 S.Ct. 1727, 1740 (Fed. Cir. 2007).

III. FINDINGS OF FACT AND ANALYSIS

35 U.S.C. § 102(b)

Findings of Fact

The record supports the following findings of fact as well as any other findings of fact set forth in this opinion, by at least a preponderance of the evidence.

1. Appellant’s claim 1 recites:

A face mask, comprising:
a body portion configured to be placed over a mouth and at least part of a nose of a user in order to isolate the mouth and the at least part of the nose of the user from the environment such that the air of respiration is drawn through the body portion,
the body portion having a baffle layer having an outer and an inner surface with a plurality of projections extending from at least one of the outer and inner surfaces that define a plurality of channels on the baffle layer configured for channeling fluid to different locations on the baffle layer,
the baffle layer configured to aid in absorbing energy associated with fluid striking the body portion and to prevent fluid strike through.

(App. Br. 9).

2. Figure 2 of Appellant’s specification is reproduced below.

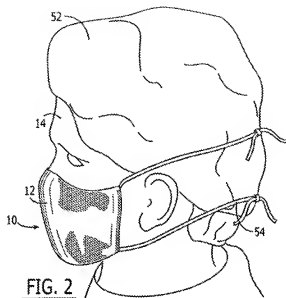


Figure 2 depicts a “face mask 10 [that] includes a body portion 12 that is configured to be placed over the mouth and at least part of the nose of the user 14 such that the air exchanged through normal respiration passes through the body portion 12 of the face mask 10.” (Spec. 8, ll. 23-26).

3. Appellant’s specification provides that the “invention provides for a baffle layer 16 incorporated in the body portion 12 of the face mask 10.” (Spec. at 9, ll. 14-15).

4. Figure 3 of Appellant’s specification is reproduced below.

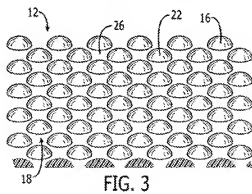


Figure 3 depicts “one exemplary embodiment” of the baffle layer 16, with “projections 22 [that] are all substantially uniform, and are circular pillows.” (Spec. 9, ll. 14-19).

5. Figure 1 of Baumann is reproduced below.

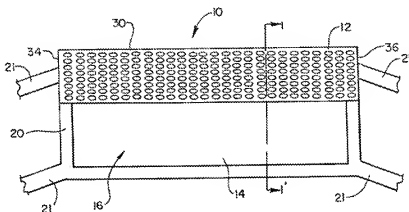


Figure 1 depicts a “plan view of the exterior surface of the face mask” (Baumann col. 2, ll. 33-34), wherein “face mask 10 includes mask portion 16, resilient member 12” (Baumann col. 3, ll. 31-33), and “major exterior surface 14” (*Id.* col. 3, ll. 51-52).

6. Figure 3 of Baumann is reproduced below.

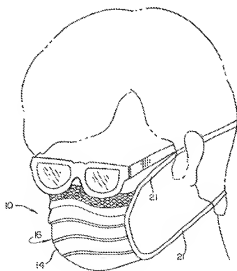


Figure 3 depicts “a perspective view of the mask of FIGS. 1 and 2 positioned on a wearer’s face” (Baumann col. 2, ll. 37-38).

7. Figures 5a and 5b of Baumann are reproduced below.

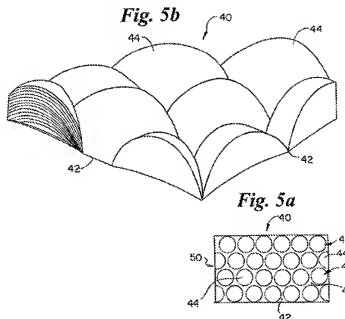


Figure 5b depicts “[p]referred resilient materials[, which] are soft and pillowed, e.g., those webs having a network of compacted higher density regions 42 and pillowed lower density regions 44” (Baumann col. 4, ll. 33-36).

8. Baumann teaches that the “resilient member” can comprise “pillowed lower density regions 44 and compacted higher density regions 42 [that] can be formed in a variety of configurations including, e.g., irregularly aligned rows arranged such that the compacted higher density regions 42 form continuous nonlinear (e.g. tortuous) passageways.” (Baumann col. 4, ll. 46-50).

Analysis

The Examiner rejected claim 1, asserting that the subject matter is anticipated by Baumann. Appellant claims

[a] face mask, comprising:

a body portion configured to be placed over a mouth and at least part of a nose of a user in order to isolate the mouth and the at least part of the nose of the user from the environment such that the air of respiration is drawn through the body portion,

the body portion having a baffle layer having an outer and an inner surface with a plurality of projections extending from at least one of the outer and inner surfaces that define a plurality of channels on the baffle layer configured for channeling fluid to different locations on the baffle layer,

the baffle layer configured to aid in absorbing energy associated with fluid striking the body portion and to prevent fluid strike through.

(FF 1). Baumann discloses a face mask with a mask portion and a “resilient member.” (FF 5). Bauman’s face mask has a “major exterior surface” that covers the user’s mouth and nose. (FF 6). Baumann teaches that the “resilient member” has “pillowed lower density regions 44 and compacted higher density regions 42 [that] can be formed in a variety of configurations including, e.g., irregularly aligned rows arranged such that the compacted higher density regions 42 form continuous nonlinear (e.g. tortuous) passageways.” (FF 8). These “pillowed” regions are like the “circular pillow” embodiment of Appellant’s baffle layer. (FF 5). Thus, Baumann discloses a face mask with a body portion covering the user’s mouth and nose and a baffle layer with a plurality of projections, which are configured into a non-linear pathway that would divert fluids.

Appellant argues that

Baumann et al's resilient member 12 with the pillowed lower density regions 44 (arguably projections) is not 'configured to be placed over a mouth and at least part of a nose of a user.' Instead, Baumann et al's resilient member 12 is configured to be positioned between the user's eyes and nose.

(App. Br. 5 (emphasis in original)). We disagree that the face mask depicted in Baumann does not meet the limitations of Appellant's claim.

Appellant's claim 1 requires "a body portion configured to be placed over a mouth and at least part of the nose of the user" (FF 1). Appellant's claim 1 also requires that the "the body portion ha[s] a baffle layer having an outer and an inner surface with a plurality of projections" (FF 1). The "body portion" and "baffle layer" recited in Appellant's claim are not one in the same as evidenced by Appellant's specification, which explains that the "invention provides for a baffle layer 16 incorporated in the body portion 12 of the face mask 10." (FF 3). Neither Appellant's claims, nor any portion of Appellant's specification that Appellant has directed us to or that we can find, requires the baffle layer to be completely contiguous with the body portion of the face mask.

Baumann depicts a face mask with a "body portion" (mask portion 16) covering the entire mouth and the entire nose of the wearer. (FF 5). Bauman's body portion includes a section having a "baffle layer" (resilient member 12). That Baumann does not depict the baffle layer covering the entire mouth and nose of the wearer does not distinguish it from the claimed face mask, because the claimed face mask does not require the "baffle layer" to be "configured to be placed over a mouth and at least part of a nose of a user," only the body portion.

Appellant argues that

[t]o accomplish being configured to aid in absorbing energy associated with fluid striking the body portion of the nose of the user, the baffle layer must indeed cover the mouth and at least a portion of the nose of the user, which is the portion most likely to be struck by fluid when the face mask is in use.

(App. Br. 3). Yet, Appellant's claim does not require that the "baffle layer" cover the mouth and at least part of the nose, only that the "body portion" does. Moreover, the claim does not require that the entire body portion cover the mouth and at least part of the nose. Areas of the body portion may extend beyond the mouth and nose.

We note that the claim is limited to a mask having a "baffle layer configured to aid in absorbing energy associated with fluid striking the body portion and to prevent fluid strike through." Appellant argues that a baffle layer would have to be placed over the "mouth and at least a portion of the nose" to "aid in absorbing energy associated with fluid striking the body portion and to prevent fluid strike through." However, Appellant has not directed us to evidence in the record supporting this argument. Moreover, it is apparent to us that a baffle layer placed anywhere on the mask and as a part of the body portion would "aid in absorbing energy associated with fluid striking the body portion and to prevent fluid strike through."

Because Baumann describes the subject matter claimed by Appellant, *see Richardson, supra*, the Examiner did not err in rejecting claim 1 under 35 U.S.C. § 102 (b) over Baumann.

35 U.S.C. § 103(a)

Findings of Fact

9. Appellant's claim 3 recites:

The face mask of claim 1, wherein:

the body portion has a first layer contacting the projections of the baffle layer; and
the body portion has a third layer contacting the inner surface of the baffle layer.

(App. Br. 10).

10. Niemeyer relates to a face mask that solves “face fit problems” with a mechanism for “pliable conforming the mask to a person’s face and mechanism for sealing between the person’s face and the filtering mechanism.” (Niemeyer col. 2, ll. 24-29).

11. Niemeyer teaches that

[i]n . . . another embodiment, a frame of relatively rigid material is installed between the foam and the filter material of the mask to provide a rigid surface against which the foam may be compressed.

(Niemeyer col. 3, ll. 3-6).

Analysis

The Examiner rejected claims 4, 15, and 16 under 35 U.S.C. § 103(a) over Baumann and Niemeyer. Appellant argues that

Niemeyer fails to correct the deficiency . . . in Baumann et al. Moreover, Niemeyer fails to disclose any baffle layer with projections as required by claims 4, 15, and 16. Thus, it is not possible for Niemeyer to be read to disclose or suggest a layer stiffer than a baffle layer with projections as required by claims 4, 15 and 16. Nor does the Final Office Action identify any such stiffer layer in Niemeyer.

(App. Br. 9).

We disagree. Baumann teaches the “baffle layer” as we noted above. At col. 3, ll. 3-6, Niemeyer expressly describes a face mask with a “relatively rigid material installed between the foam and filter material of the

mask” (FF 11). The “relatively rigid material” of Niemeyer is stiffer than the other layers of the disclosed mask. Thus, we are not convinced that the Examiner erred in rejecting claim 4 under 35 U.S.C. § 103(a) over Baumann and Niemeyer.

IV. ORDER

Upon consideration of the record and for the reasons given, the Examiner’s rejection of claims 1-3, 5, 10, 12, 13, 20, and 25 under 35 U.S.C. § 102(b) over Baumann is **AFFIRMED**;

the Examiner’s rejection of claims 4, 15, and 16 under 35 U.S.C. § 103(a) over Baumann and Niemeyer is **AFFIRMED**.

FURTHER ORDERED that no time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a).

AFFIRMED

ack

cc:

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